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Court : Allahabad

Decided On : Dec-19-1933

Reported in : AIR1934All340; 152Ind.Cas.249

Appellant : Suraj Bali

Respondent : Emperor

Judgement :

Bennet, J.

1. These are three applications in revision on behalf of five persons who have been convicted in one trial under the same Section 325, Penal Code, and sentenced to six months' rigorous imprisonment and Rs. 100 fine or in default 2 months' further rigorous imprisonment by a Tahsildar Magistrate. The appeal to the Joint Magistrate was dismissed and an application in revision to the Sessions Judge has been dismissed. It is now for the fourth time that the matter has been brought before the Courts. Many grounds have been argued at considerable length. One point was that the medical witness made an examination on 18th January 1982, and another examination on 29th January 1932, 11 days later. In the first examination the medical witness discovered nine injuries, mostly contusions, which wore simple. In the second examination he discovered three grievous injuries including a fracture of the right fibula at its upper end and a fracture of the sixth left rib, the duration being about 12 days. It is obvious that the

injury to the fibula was not apparent at the first examination because of the swelling on the right knee, and similarly the injury to the rib would be concealed by the swelling. No clear question was asked of the doctor as to why he did not discover the grievous injuries on the first examination. In revision it is argued that the second medical examination was 'not only irregular but was a definite attempt to fabricate a case.' No argument of this nature appears to have been put before the Courts below and there is nothing at all to support such a theory, nor has learned Counsel shown me any authority in any work' of medical jurisprudence which would support his view that the injuries would have been discovered on the first examination, if they had then been present. The second report states that the injuries were about 12 days old, which would mean that they were present when the first examination was made eleven days previously. The complainant apparently remained in hospital all the time until his death on the 29th February and there was a postmortem examination on 1st March 1932. The cause of death was given as old age and gradual exhaustion due to suppurating wounds on his body. His age was about 80 and it was noted that there was an abscess in front of the right knee-joint and the one operated wound on the back of the right knee and an ununited old fracture of the fourth and fifth ribs on the left side and one old ununited fracture of the right fibula near its upper end. These apparently are injuries which were caused by the assault. Owing apparently to the age of the deceased and to his sickly condition no case was put forward by the police under Section 302, or Section 304, Penal Code, and the case proceeded on complaint. The original complaint made on the 19th January 1932, after the first medical examination, was under Section 323 and on the second medical examination the charge was altered to Section 325, Penal Code. Another ground of revision urged is that the accused had been discharged three times by the trial Court and therefore a fresh complaint could not be taken cognizance of, without a revision of the order of discharge and that the subsequent trial and conviction were void in law. The previous complaints were dismissed for default. The argument was made that these complaints were disposed of under Section 247, Criminal P.C., and therefore there was an acquittal. That is incorrect because that section applies only to a summons base and the complaint being under Section 323, Penal Code, was of a warrant case. The correct section is Section 259, Criminal P.C., and that

section does not refer to an acquittal but to a discharge. Under Section 403, explanation, the dismissal of a complaint or the discharge of the accused is not an acquittal for the purpose of that section and therefore the dismissal of the previous complaints or the discharge of the accused is no bar to a further trial under Section 403, Criminal P.C. The fourth ground of revision was that copies of statements under Section 162, Criminal. Procedure Code, were not supplied to the applicants and they were therefore prejudiced in the cross-examination of the prosecution witnesses. The application for such copies was not made until the statements of the prosecution witnesses had been completed and their cross-examination had closed. Under Section 162, Cr. P.C., the only use to which such statements may be put is under Section 145, Evidence Act, to contradict a witness, and for this purpose the attention of the witness must be drawn to the statements and the time when the application should be made is 'when any witness is called for the prosecution.' The section does not authorise the granting of such copies after the evidence of the witnesses has closed, and those is no use to which such statements can then be put. Lengthy argument was made in regard to a dying declaration of the complainant which was recorded by a Magistrate which was tendered in evidence without the Magistrate who recorded it being called. The opinion of the learned Sessions Judge was that if this evidence was discarded there will still remain sufficient evidence on the record to convict the applicants. Three witnesses, Narsingh, Baramdeo and Bandhu, gave evidence for the prosecution that they saw all the accused beating the deceased Mahabir Panda with lathis. Learned Counsel attempted to show that it was necessary to call the Magistrate who recorded the dying deposition. He has produced no ruling in his favour with the exception of a very old ruling of the Bombay High Court reported in Reg v. Fata Adaji (1874) 11 Bom. H.C. 247. In that case the Government Prosecutor argued that the dying declaration before a Magistrate on solemn affirmation might be admitted without proof under Section 80, Evidence Act. One of the learned Judges observed:

The Magistrates was not the committing Magistrate, and the prisoners were not present, and had no opportunity of cross-examining the dying man.

2. Now, of these three reasons given not one reason would be altered if the Magistrate who recorded the dying deposition were called. That Magistrate would not become the committing Magistrate by being called as a witness, nor would the defect of the accused having been absent and not having had an opportunity of cross-examination be in any way removed by the calling of the Magistrate who recorded the dying deposition. Further on the Court observed:

The law does not provide that the mere signature of a Magistrate shall he a sufficient authentication of such a document.

3. The only question before the Court was whether Section 80 does or does not make that provision. The mere declaration that it does not is no reason. Learned Counsel also referred to two rulings of the Calcutta High Court, one of which is Gouridas Namasudra v. Emperor (1909) 36 Cal. 659 and the other is : AIR1930 Cal228 , Tafiz Pramanik v. Emperor, In neither of these cases was there any reference to Section 80, Evidence Act, and therefore the rulings cannot be taken as decisions on that section. There are two rulings of this High Court in which this section has been considered and those rulings assume that the section does apply to depositions and similar statements which may be proved by the production of the document without any witness being called to prove it. The first of these rulings is Queen-Empress v. Pokh Singh (1888) 10 All. 174. In that case there was the deposition of a medical witness which was merely signed by the Magistrate and the certificate required by Section 509, Criminal P.C., that the deposition was taken and attested by a Magistrate in the presence of the accused was wanting. The prosecution argued that Section 80, Evidence Act, might be held to cover this defect. The Court held that the section could not be used for this purpose. The language used on p. 178 indicates that the Court considered that the section could be used for the purpose of tendering a document without calling evidence to prove it. The next ruling is in Queen-Empress v. Sundar Singh (1890) 12 All. 595. That was a case where the prosecution tendered a document purporting to be the record of a confession recorded by a Magistrate in Gwalior State. It was held that under Section 80 this record was admissible to prove that the confession had been duly made and that it was not necessary to call the Magistrate who recorded the confession. In Maqbulan v. Ahmad Husain (1904) 26 All. 108 their Lordships of the

Privy Council had a case in which a certified copy of the statement of a witness in a previous case was tendered as evidence and their Lordships held on pp. 117 and 119 that that statement was admissible to prove the previous statement of the witness without calling any further evidence. Apparently it was hold admissible under Section 80, Evidence Act, as on p. 117 it is shown that that was a section to which a reference was made by the counsel desiring the document to be accepted. It was held however that the description of the witness given in the heading was not part of the {deposition and therefore could not be admitted as proved by the mere production of the document. Having regard to these three rulings I am of opinion that it is not shown that the tahsildar was wrong in accepting the dying declaration of Mahabir as evidence. Another argument which was advanced by learned Counsel for the defence was based on the word 'evidence' appearing in Section 80, Evidence Act. He argued that a dying deposition could not come under Section 80 because it was not evidence ad the time at which it was recorded. For this purpose he referred to the definition of 'evidence' in Section 3 which is stated to be Sub-section (1):

All statements which the Court permits or requires to be made before it by witnesses, in volution to matters of fact under inquiry, such statements are called oral evidence.

4. His argument was that there was no case before the Magistrate recording the dying deposition and therefore there was no fact under enquiry and there could be no evidence taken by him. But this is an argument which ignores the definition of 'Court,' given in Section 3. Under that section a Court includes all Judges and Magistrates and all persons, except arbitrators, legally authorised to take evidence. The Magistrate who recorded the dying declaration was legally authorised to do so, and the inquiry which he was making was an inquiry directed for the purpose of recording that particular statement. Consequently, in my opinion, the dying deposition doss amount to evidence within the meaning of Section 80. No further point was argued. I consider that under the circumstances of the case the accused have received an extremely light punishment. The applications in revision are therefore dismissed.